Commonwealth of Massachusetts
State Ethics Commission

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SUFFOLK, ss

COMMISSION ADJUDICATORY
DOCKET NO. 709

IN THE MATTER
OF
CHANRITHY UONG

Appearances: Laurie Ellen Weisman, Esq.
Stephen P. Fauteux, Esq.
Counsel for Petitioner

Philip S. Nyman, Esq.
Barbara M. Callahan, Esq.
Leonard A. Shamas, Esq.
Counsel for Respondent

Commissioners: Daher, Ch., Roach, Todd, Maclin, Moore

Presiding Officer: Commissioner J. Owen Todd

DECISION AND ORDER

I. Procedural History

This matter was commenced on July 1, 2004, with the issuance of an Order to Show Cause ("OTSC") by Petitioner against Respondent Chanrithy Uong ("Uong"). The OTSC alleged that Respondent, originally a guidance counselor at Lowell High School ("LHS") who was elected as a Lowell city councilor, repeatedly violated § 20 of G. L. c. 268A by accepting appointment to an LHS housemaster position in mid-2002 and by being reappointed to the housemaster position in 2003 and 2004 while continuing to serve as a city councillor.

In his Answer, filed on July 27, 2004, Respondent admitted most of the general factual chronology of the OTSC, but denied that his appointment and reappointments as a housemaster violated § 20. The Answer pleaded nine affirmative defenses, including the "city councillor's exemption" and the statute of limitations.

A pre-hearing conference was held on August 16, 2004, before Commissioner Todd. At the pre-hearing conference, Respondent made and filed a motion for Commissioner Todd to recuse himself. Petitioner took no position on Respondent's motion. On August 18, 2004, Commissioner Todd issued a written ruling denying Respondent's motion.

Also on August 18, 2004, a Scheduling Order was issued scheduling discovery and other matters in preparation for an adjudicatory hearing scheduled for September 28, 2004, by agreement of the parties. Subsequently, on Respondent's motion and over Petitioner's opposition, the adjudicatory hearing was rescheduled to October 28, 2004. Between the pre-hearing conference

and the October 28, 2004 hearing, the parties conducted discovery, exchanged exhibit and witness lists and agreed to certain stipulations.

On October 23, 2004, Respondent filed an amended motion for Commissioner Todd to recuse himself. Petitioner took no position on Respondent's motion. On October 22, 2004, Commissioner Todd issued a written ruling denying Respondent's amended motion.

The hearing of this matter occurred on October 28, 2004. At the hearing, Respondent orally renewed his motion for Commissioner Todd to recuse himself and the renewed motion was orally denied. The parties' stipulations were by agreement made part of the evidentiary record. In addition, documents were admitted into evidence as Exhibits 1, S-2 through S-37 and 38 through 45. Both parties called, examined and cross-examined witnesses.

The parties' counsel made both opening and closing statements. The hearing was recorded and transcribed by a professional court reporter. The parties waived the opportunity to orally argue their cases before the full Commission. The parties submitted their briefs on January 28, 2005. Commissioner Todd certified the hearing transcript on February 3, 2005. The Commission began its deliberations in this matter on February 3, 2005 and continued those deliberations on March 3, 2005, April 7, 2005, May 5, 2005 and June 2, 2005.

II. Findings of Fact

1. In 1999, Uong was a paid, appointed guidance counselor at LHS. As a LHS guidance counselor, Uong was a municipal employee of the City of Lowell.

2. In November 1999, Uong was elected as a Lowell city councillor. Uong was re-elected as a city counselor in November 2001 and again in November 2003. At present, Uong continues to serve on the Lowell City Council. The position of Lowell city councillor is compensated by a salary of about $15,000 per year. As a Lowell city councillor, Uong is a Lowell municipal employee.

3. Uong relied on the city councillor's exemption in G.L. c. 268A, § 20 to allow him to serve as both a Lowell city councillor and a LHS guidance counselor. To satisfy the requirements of the § 20 city councillor's exemption, Uong declined his city councillor compensation and did not vote or act as a city councillor on any matter within the purview of the Lowell school department. Uong has continued to decline his city counsellor's compensation and to not vote or act as a city councillor on any matter within the purview of the school department to the present.

4. On December 8, 1999, Uong sought an opinion from the Lowell city manager and the city solicitor as to whether he could: (a) donate the city councillor's salary that he was ineligible to receive to charity; and (b) apply for an assistant principal's position at a Lowell middle school while continuing to serve as a city councillor. Uong also asked for assistance in preparing a Home Rule Petition, if the answer to his first question was "no."

5. On December 14, 1999, the Lowell City Solicitor advised Uong: (a) that assuming Uong opted to continue to receive his guidance counselor salary, he was not entitled to also receive the city councillor's salary and, thus, could not donate that salary to charity; and (b) that Uong could continue to hold his LHS guidance counselor position while serving as city councillor, "but would not be eligible for appointment to an additional position (Assistant Principal) while a member of the City Council or for six months thereafter." Uong understood the City Solicitor's advice, but disagreed with it. The City Solicitor also advised Uong that a Home Rule Petition could be filed seeking the

amendment of § 20 and offered to assist Uong in preparing the Petition. The City Solicitor's opinion was referred to the Commission's Legal Division for review.

6. On April 10, 2001, the Commission issued a formal opinion regarding Uong that was designated as *EC-COI-01-1*. In summary, the formal opinion advised Uong that G.L. c. 268A, § 20 would not permit him to relinquish his paid position as a "school counselor" and accept a paid position as an assistant principal or principal while a member of the City Council or for six months thereafter.

7. Uong received a copy of *EC-COI-01-1* in or about April 2001. Uong read the opinion. Uong understood the opinion, but disagreed with it. On May 3, 2001, Uong called the Commission's Legal Division and spoke to Senior Staff Counsel Christopher N. Popov, who advised Uong that he could seek a legislative change or appeal to the superior court.[1] Uong was aware that he could seek a legislative change, but he did not pursue it. Uong also did not seek to have the opinion reviewed by the Superior Court.

8. Uong was not appointed to the assistant principal position and he remained a guidance counselor at LHS until 2002.

9. Uong's annual salary as a LHS guidance counselor was $53,462 in 1999, $58,125 in 2000, $59,288 in 2001 and $60,029 in 2002. Uong was compensated as a guidance counselor pursuant to collective bargaining agreements entered into between the School Committee of the City of Lowell ("School Committee") and the Lowell School Administrators Association ("LSAA"). During that same time period, Uong's core duties as a guidance counselor remained substantially unchanged. Those duties included counseling students about course selection and future career options, and helping students resolve difficulties in both academic and nonacademic work.

10. By letter to the Lowell Public Schools Assistant Superintendent dated March 19, 2002, Uong, then a city councillor and a LHS guidance counselor, applied for a position as a LHS housemaster. The housemaster position, then also known as a "submaster" position, had been posted.

11. LHS does not have "principals" or "assistant principals." The LHS headmaster position is the high school equivalent of the position of principal at the middle and elementary schools. A housemaster reports to the headmaster and is the closest equivalent in the high school administration to an assistant principal at the middle and elementary schools. A housemaster is responsible for student discipline, as well as other management, operational and instructional leadership duties. The position of LHS housemaster, unlike that of guidance counselor, requires state certifications for service as a teacher and as a secondary school principal.

12. Uong competed as one of seven candidates for the housemaster position. A selection committee reviewed the applications and Uong was chosen as one of four final candidates. In or about May 2002, Uong was appointed to the housemaster position. The LHS headmaster and the Lowell Superintendent of Schools jointly made the appointment.

13. Uong began serving as a housemaster on August 20, 2002. Upon his becoming a LHS housemaster, Uong relinquished his position and compensation as a guidance counselor and was paid only as a housemaster. Uong's initial annual salary as a housemaster was $81,033, an increase of about $21,000 over his guidance counselor salary. A change of assignment notice filed

in the Personnel Office of the Lowell City Schools, dated July 6, 2002 and effective August 20, 2002, reflects that Uong would be paid as a "Submaster" out of "City" funds.

14. Uong was reappointed to the housemaster position in or about May 2003, with a salary of $82,653, which was increased to $83,479 on January 1, 2004. Uong was again reappointed as housemaster in or about May 2004, with a salary of $84,314. Uong has continued to serve as both a city councilor and housemaster to the present.

15. Since his appointment in 2002, Uong has served and been compensated as a LHS housemaster pursuant to the governing collective bargaining agreement between the School Committee and the LSAA. The collective bargaining agreement is a contract made by a municipal agency of the City of Lowell (the School Committee) in which the City is an interested party.

16. Since his appointment as a LHS housemaster in 2002, Respondent has known or had reason to know that, by virtue of his paid employment as a LHS housemaster, he has a financial interest in the collective bargaining agreement between the School Committee and the LSAA.

17. Uong is well-regarded in Lowell for his service as a city councillor and community leader and his effective performance as guidance counselor and housemaster at the LHS, where he is an important and valued member of the staff.

18. On June 15, 2004, the Commission found reasonable cause to believe that Uong violated G. L. c. 268A, § 20 and authorized adjudicatory proceedings. The OTSC in this matter was issued, served and filed by Petitioner on July 1, 2004.

III. Decision

A. Respondent's Statute of Limitations Affirmative Defense

Respondent argues as an affirmative defense that the three year limitations period began to run in December 1999 when he first made known his intention to seek an assistant principal position, and thus, the 2004 OTSC was time barred.

The Commission's Rules of Practice and Procedure set forth, at 930 CMR 1.02 (10), a "statute of limitations" for the issuance of Commission orders to show cause. The regulation requires that an order to show cause "must be issued within three years after a disinterested person learned of the violation" and in no event more than six years after the violation. Under the regulation, the respondent must affirmatively plead the statute of limitations defense, in which case, the petitioner has the burden of showing that a disinterested person learned of the violation no more than three years before the order was issued. This burden is met as to all violations other than § 23 violations by the petitioner's submission into evidence of three affidavits (from the Commission investigator responsible for the case, from the Attorney General's Office and from the appropriate district attorney's office). Finally, the regulation provides that if the petitioner meets this burden, then "the respondent will prevail on the statute of limitations defense only if he/she shows that more than three (3) years before the order was issued the relevant events" were either "a matter of general knowledge in the community" or the subject of a complaint to the Commission, the Attorney General's office or the appropriate district attorney's office.

Respondent has Not Proved his Statute of Limitations Affirmative Defense

First, Petitioner has met its burden under the Commission's statute of limitations regulation and Respondent has not. Petitioner submitted into evidence the required affidavits from the Commission investigator responsible for the case, the Attorney General's Office and the Middlesex District Attorney's office (Exs.38, 39 & 40), thus meeting its burden of showing that "a disinterested person learned of the violation no more than three years before the order was issued." Respondent failed to show that more than three years before the OTSC was issued the relevant events were either "a matter of general knowledge in the community" or the subject of a complaint to the Commission, the Attorney General's office or the appropriate district attorney's office.

Second, given that Uong's housemaster appointment (and first alleged § 20 violation) occurred in May 2002 and the OTSC was issued just over two years later on July 1, 2004, it is not possible that the applicable three year limitations period had run on the violation at the time the OTSC was issued. The limitations period runs from the date when, in the terms of the Commission's regulation, "a disinterested person" learns of the violation and a violation cannot be learned of before it occurs.[2] Respondent provides no legal authority for his argument that the limitations period began to run at the time he made known his intention to seek an assistant principal position -- a position to which he was not in fact appointed and, thus, as to which he did not violate § 20. Contrary to Respondent's argument, reason to know that "Respondent was considering what turned out to be his course of action regarding his employment" is not the same as reason to know of a cause of action for a violation of § 20. Respondent's argument is inconsistent with the basic principle that a limitations period for a cause of action runs from the point when the cause of action in question first accrues. Obviously, a cause of action for a § 20 violation cannot accrue before the violation is committed. Intent to commit a § 20 violation is not in itself a G. L. c. 268A violation and can not trigger the running of the statute of limitations prior to the actual commission of the violation.[3]

B. Section 20

> Section 20 of G. L. c. 268A, in relevant part, prohibits a municipal employee from having "a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know." As we have previously observed, § 20 is intended to prevent a municipal employee from influencing the award of contracts by any municipal agency in a way which might be beneficial to the employee and is concerned with the potential for impropriety as well as with actual improprieties. *EC-COI-01-1*, *EC-COI-99-2,* see *Quinn v. State Ethics Commission, 401 Mass. 210, 214 (*"Chapter 268A is concerned with the appearance of and the potential for impropriety as well as with actual improprieties"*)*. [4]

Thus, to find a violation of § 20, there need not be proof of actual inside influence. Instead, the Commission need only find that: (a) the respondent was a municipal employee; (b) who had a direct or indirect financial interest of which he had knowledge or reason to know; (c) in a contract made by a municipal agency; (d) in which the municipality is an interested party. *In re Pathiakis*, 2004 SEC 1167, 1176. The burden of proof as to the respondent's alleged G. L. c. 268A, § 20 violation is on the petitioner, which must prove its case by a preponderance of the evidence. 930 CMR 1.01(9)(m)(2). The weight to be attached to any evidence in the record rests within the sound discretion of the Commission. Id. 1.01(9)(l)(3).

If the petitioner meets its burden of proving the above-stated elements of a § 20 violation, the violation will be found unless the respondent proves that his financial interest in the municipal contract was permitted by an exemption to § 20. Under Commission precedent, the burden of proving compliance with an exemption to a prohibition under G. L. c. 268A is on the public official claiming the exemption. *In re Pathiakis*, at 1172; *In re Cellucci*, 1988 SEC 346, 349.

C. Petitioner's Case

In the OTSC in this matter, Petitioner did not simply plead the elements of Uong's alleged § 20 violations. In addition, Petitioner pleaded that the city councillor's exemption was "the only § 20 exemption available to Uong," that Uong "relied on the city councilor's exemption to enable him to serve as both guidance counselor and elected city councilor" and that Uong "violated the city councilor's exemption and § 20" by accepting appointment and two reappointments to the LHS housemaster position while continuing to serve as a city councillor. In doing so, Petitioner incorporated proof of Uong's alleged violations of the city councillor's exemption into its case-in-chief.[5]

D. Petitioner Has Proved the Elements of Uong's Alleged § 20 violations

Petitioner has proved by a preponderance of the evidence each of the elements of Uong's alleged § 20 violations. First, the parties have stipulated, the evidence shows and we find that Respondent is, as an elected member of the Lowell city council, which is a Lowell municipal agency[6], a Lowell municipal employee[7] for the purposes of § 20. Second, the parties' stipulations that Uong, while already serving as an elected city councillor, was appointed as a LHS housemaster in 2002 and has served as both an unpaid city councillor and a compensated housemaster since that time (with reappointments in 2003 and 2004), together with other evidence in the record, establish and we find that Respondent has had since his 2002 housemaster appointment, a financial interest of which he has had knowledge or reason to know in a contract made by a Lowell municipal agency in which the City of Lowell is an interested party. More specifically, the evidence shows and we find that Respondent's employment and compensation as a LHS housemaster is, and has been, pursuant to collective bargaining agreements between the School Committee and the LSAA, that those agreements have been and are contracts made by a Lowell municipal agency (the School Committee)[8] in which the City of Lowell has been and is an interested party[9], and that Uong has and has had a financial interest[10] in those contracts. Finally, the evidence shows and we find that Respondent knew or should have known of his financial interest given that he has been paid an annual salary of over $80,000 since 2002 for his services as a LHS housemaster and has declined the $15,000 salary for serving as a city councillor in order to accept his housemaster salary. These findings apply to both Uong's 2002 appointment and his 2003 and 2004 reappointments.

Having found that the preponderance of the evidence in the record establishes each of the elements of Uong's alleged § 20 violations, we turn to the question of whether Respondent's financial interest was exempted from § 20's prohibition by any applicable exemption.

E. The City Councillor's Exemption

While there are several exemptions to § 20, the only exemption which is relevant to this matter is the so-called "city councillor's exemption." This exemption provides,

This section [§ 20] shall not prohibit an employee of a

> municipality with a city or town council form of government from holding the elected office of councillor in such municipality, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office; provided, however, that no such councillor may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and provided, further, that no councillor shall be eligible for appointment to such additional position while a member of said council or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by a municipal agency in any matter shall be grounds for avoiding, rescinding or canceling such action on such terms as the interest of the municipality and innocent third parties require. No such elected councillor shall receive compensation for more than one office or position held in a municipality, but shall have the right to choose which compensation he shall receive.

Beginning with the OTSC, Petitioner's case conceded Respondent's compliance with all of the requirements of the city councillor's exemption excepting only the appointment restriction: "and provided, further, that no councillor shall be eligible for appointment to such additional position while a member of said council or for six months thereafter," in the exemption's first sentence. Petitioner sought to prove that Uong violated the city councillor's exemption by being appointed to an "additional position" when he was appointed as a housemaster in 2002 and when he was reappointed to that same position in 2003 and 2004. Respondent in turn attempted to prove his compliance with the appointment restriction, arguing that the housemaster position was a "substituted" rather than additional position.

The primary statutory interpretation issue of this matter is, therefore, the meaning of the provision "and provided, further, that no councillor shall be eligible for appointment to such additional position while a member of said council or for six months thereafter" in the first sentence of the city councillor's exemption. The parties have focused on the meaning of the words "such additional position." Petitioner argues that the phrase is ambiguous and that the Commission was correct in *EC-COI-01-1* to rely on legislative history and to conclude that the phrase prohibits appointments to any new municipal position, even "promotions" from one position to another. Respondent counters that the meaning of the statutory language at issue is clear and unambiguous and that the Commission erred in considering legislative history in construing the exemption in *EC-COI-01-1*. Respondent argues that "such additional position" refers to a third position (*added to* the preexisting municipal employment and the elected councillor's position) and not to a position "substituted" for the original municipal employee position.

"Such Additional Position"

We begin our analysis with the plain meaning of the statutory language of the city councillor's exemption appointment prohibition.[11] According to common and ordinary usage, the phrase "such additional position" in the first sentence of the city councillor's exemption would normally be read as referring back to a position previously identified in the sentence, as "such" commonly means "of a kind previously specified."[12] The first sentence of the city councillor's exemption refers to only two positions, the elected office of councillor and municipal employment (i.e., "an employee of a municipality"). Given that the full provision states "and provided, further, that *no councillor* shall be eligible *for appointment to such additional position* while a member of said council or for six months

thereafter" (emphasis added), it is clear that the "such additional position" referred to is not the *elected* councillor position, but rather the municipal employee position.

It is also clear that a municipal employee, for example a school department employee, who is elected to the city council and continues to hold his school department position, in ordinary usage holds that position *in addition to* his city councillor position, even though he held the position before his election. In other words, *relative to and from the perspective of his elected councillor position*,[13] his original school department employee position is an *additional* position.[14] Similarly, a sitting city councillor first appointed after his election to a school department position would be appointed to a position *additional* to his elected office. Further, because "additional position" in the context of the city councillor's exemption clearly refers to "a position in addition to the elected position of councillor," the city councillor's post-election appointment to the school department position would be an appointment to an "additional position" even if the city councillor were to give up a previously held appointed municipal position in order to accept the new appointment.

Accordingly, as a matter of plain meaning, the phrase "such additional position" in the appointment prohibition clause of the city councillor's exemption refers to any appointed municipal employee position in addition to the elected office of councillor (including but not limited to the specific municipal employee position held before the councillor's election). Therefore, as we found in *EC-COI-01-1*, the appointment prohibition of the city councillor's exemption does not merely bar a municipal employee who is elected as a city councillor from being appointed to a second appointed municipal position[15], it also bars his appointment to any new municipal position, even if he gives up his original appointed position in order to accept the new appointment. [16] Indeed, if applied literally, the appointment prohibition would bar a municipal employee who is elected as a city councillor from being reappointed after his election to his original municipal position. We are obligated, however, to "give the statute a workable meaning." *Graham*, 370 Mass. at 140.

Reappointments to the Same Position held Prior to Election are not Barred

We have previously (in construing the "selectman's exemption" on which the city councillor's exemption is based) declined to apply the statutory language literally to bar reappointment to the same position held prior to election on the grounds that to do so would defeat the legislative purpose of the exemption. In *EC-COI-82-107,* we concluded that the limitation on appointment eligibility of the selectman's exemption "was intended to prohibit only new, post-elective appointments to municipal positions and was not intended to prohibit municipal employees from eligibility for reappointment to positions held immediately prior to their election as selectman…To construe § 20 so that a selectmen [sic] could not be eligible for reappointment for positions held prior to election would, in effect, nullify the legislative purpose in enacting St. 1982, c. 107, and would be inconsistent with the Commission's obligation to give G. L. c. 268A a workable meaning."

The conclusion of *EC-COI-82-107* concerning the selectman's exemption is also applicable to the city councillor's exemption.[17] Accordingly, consistent with *EC-COI-82-107*, we construe the appointment prohibition of the city councillor's exemption not to bar reappointment of a city councillor to the same municipal employee position he held prior to his election in order not to nullify the statute's legislative purpose[18] and to give the statute a workable meaning.[19]

Appointments to Positions Not Held Prior to Election are Barred

Accordingly, we construe the appointment prohibition of the city councillor's exemption to bar all post-election appointments of councillors to positions of municipal employment which are not reappointments to the same positions held by the councillors *prior to their election*.[20] Therefore, we conclude that the city councillor's exemption: (a) allows a city employee who is elected to the city council to continue in the same city position he occupies at the time of his election; and (b) disqualifies city councilors from appointment to any new municipal employment positions until they have been off the council for six months.[21] Thus, with the city councillor's exemption the Legislature has made it allowable under § 20 for an appointed paid municipal employee to also serve (with some restrictions) as an elected city councillor while at the same time ensuring (through the appointment prohibition) that the employee does not thereby gain (by virtue of his city councillor position) an "inside track" to any new appointed municipal position.

F. Uong's Appointment and Reappointments as Housemaster Violated the City Councillor's Exemption Appointment Prohibition and § 20

Petitioner has proved by a preponderance of the evidence that the LHS housemaster position was a new and different position from Uong's original, pre-city council election, paid city position as a LHS guidance counselor. First, the evidence establishes that the two positions require different qualifications and involve different duties. The evidence shows that a guidance counselor counsels students while a housemaster is responsible for student discipline, as well as other management, operational, and instructional leadership duties. In addition, whereas the position of guidance counselor requires state certification for service as a guidance counselor, the position of housemaster requires state certifications for service as a teacher and as a secondary school principal. Second, Uong was appointed as a LHS housemaster as a result of an open and competitive application, selection and appointment process. The evidence shows that Uong formally applied for the housemaster position by letter and competed for the position with several other applicants, three of whom were interviewed as finalists along with Uong. Uong's 2002 appointment as a housemaster was thus not a reappointment to a position held before his election to the city council (which is permitted by the city councillor's exemption), but rather a new appointment to a new paid city position. This conclusion also applies to Uong's 2003 and 2004 reappointments as housemaster.

Accordingly, we conclude that Uong's 2002 housemaster appointment was an appointment for which he was not eligible under the appointment eligibility prohibition of the city councillor's exemption. We reach the same conclusion regarding his 2003 and 2004 reappointments as housemaster. In short, because Uong did not hold the housemaster position prior to his election as a city councillor, he was not eligible for appointment (or reappointment) to the housemaster position while he was on the council and for six months thereafter.

Based on the statutory analysis set forth above, we do not accept Uong's contention that the appointment eligibility prohibition of the city councillor's exemption did not apply to his appointment as housemaster because upon his appointment to that position he gave up his former guidance counselor position. Uong's contention is unsupported by the language of the exemption and his interpretation of the statute would undermine its legislative purpose.

Therefore, Uong's appointment and reappointments to the housemaster position while he continued to serve as a city councillor violated the appointment eligibility prohibition of the city councillor's exemption to § 20 and were not allowed under the exemption. Thus, by, while serving as a city councillor, accepting appointment in 2002 to the new position of housemaster and reappointments to that position in 2003 and 2004 and thereby having a financial interest in the

municipal contract under which he has served and is serving in that new position which is not exempt from § 20, Uong repeatedly violated § 20. Uong's continued service in the housemaster position based on appointments and reappointments for which he was not eligible is an ongoing § 20 violation.

IV. Conclusion

Uong violated § 20 by, while serving as a city councillor in 2002, accepting appointment to the paid municipal position of housemaster and as a result having to his knowledge a financial interest in a contract with a Lowell municipal agency in which the city was an interested party that was not exempt under city councillor's exemption or any other exemption to § 20. Each of his subsequent acceptances of his reappointments as housemaster in 2003 and 2004 have similarly violated § 20. Uong's violation of § 20 has continued and is ongoing as he continues, in addition to being an elected city councillor, to serve as a salaried housemaster based on appointments and reappointments for which he was not eligible.

V. Order

Having concluded that Respondent Uong has violated and is violating G. L. c. 268A, § 20, the Commission, pursuant to the authority granted it by G. L. c. 268B, § 4(j), hereby orders Uong to pay a civil penalty of $6,000 for violating G. L. c. 268A, § 20, and further orders Uong to cease and desist from violating G. L. c. 268A, § 20, by relinquishing his LHS housemaster position within thirty (30) days of the issuance date of this Decision and Order.[22]

DATE AUTHORIZED: June 2, 2005
DATE ISSUED: June 6, 2005
SIGNED:

E. George Daher, Chairman
Christine M. Roach
J. Owen Todd
Tracey Maclin
Christopher Moore

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[1] While Uong testified that he did not recall Popov advising him of these options (Transcript at 197), we find Popov's testimony on this point, which is supported by Exhibit 45, to be credible.

[2] The Supreme Judicial Court has held that the statute of limitations on a conflict of interest law violation is tolled until the Commission has "some reason to know" that conduct potentially violating the statute has occurred. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000). See *Zora v. State Ethics Commission*, 415 Mass. 640, 646-48 (1993); *Nantucket v. Beinecke*, 379 Mass. 345, 349-50 (1979).

[3] Respondent's Answer set forth eight "affirmative defenses" in addition to the statute of limitations. All but one of these are legal arguments rather than affirmative defenses. Respondent's "city councillor's exemption" affirmative defense is discussed *infra*.

[4] As articulated by William G. Buss, Jr., a leading commentator on G. L. c. 268A:

> …section 7 [the state counterpart to § 20] announces a rule the basis of which is that, if no exemption is applicable, any state employee is in a position to influence the awarding of contracts by any state agency in a way which may be financially beneficial to himself. In a sense, the rule is a prophylactic one. Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as though they have influence. (footnote omitted) Therefore, because a state employee, in some circumstances, might use his position to see that contracts are awarded, not just to his own company but to companies with which his company does business, it is assumed by the statute that such circumstances always exist unless an exemption can be shown to be applicable.

W. G. Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis,* 45 B.U.L. Rev. 299, 373-74 (1965); *See EC-COI-82-109.*

[5] In his Answer to the OTSC, Respondent pleaded the city councillor's exemption as his fourth affirmative defense.

[6] The conflict of interest statute defines "municipal agency" as "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." *G. L. c. 268A, § 1(f)*.

[7] For the purposes of G. L. c. 268A, a "municipal employee" is any person "performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis", with two exclusions not here relevant. *G. L. c. 268A, § 1(g)*.

[8] Under Massachusetts law the duty of maintaining public school education is placed with the cities and towns. *G. L. c. 71, § 1.* This duty is delegated to the municipality's school committee. *G. L. 43, §§ 31 & 33, G. L. c. 71, § 37.*

[9] The preamble to the collective bargaining agreement states, "it is hoped that the Agreement entered into will contribute to the betterment of public education in the City of Lowell." Also, as the direct beneficiary of the contract, the City was an interested party for § 20 purposes. See *Pathiakis.*

[10] Although, as the Court has noted, G. L. c. 268A is "deficient in not containing a definition of 'financial interest,'" "[t]he interest of a school employee in his own compensation … is unquestionably a 'financial interest,'…" *Graham v. McGrail,* 370 Mass. 133, 138-139 (1976).

[11] *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) ("The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned for the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.")

[12] See *Black's Law Dictionary* (Fifth Edition), which defines "such" as, "Of that kind, having a particular quality or character specified. Identical with, being the same as what has been mentioned. Alike, similar, of the like kind. 'Such' represents the object already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent."

[13] The appointment restriction provision of the city councillor's exemption addresses the dual municipal office holding situation from the perspective of the elected councillor's position.

[14] "Additional" means "existing or coming by way of addition" and is synonymous with "added." *Webster's Third New International Dictionary* (unabridged 1993). "Addition" is the process of adding. *Id*. "Add" means to join or unite so as to bring about an increase (in number, quantity or size). *Id.* "Additional" thus refers to anything joined or combined with anything else resulting in an increase (in number, quantity or size); each joined thing is "additional" to the other. Here, for example, an appointed municipal position held by an elected city councillor is, from the perspective of the elected position, an "additional" position which combined with the elected position results in the holding of two municipal positions.

[15] If the Legislature's intent had been to merely prohibit a city councillor's addition of a second appointed position (and to allow the substitution of a new appointed position for a previously held one) it could readily have done so by providing, for example, "no councillor shall simultaneously serve in more than one appointed position." By contrast, in providing that "no councillor shall be eligible for appointment to *such additional position*" (emphasis added), the Legislature evidently intended to impose a greater restriction on councillors' eligibility for appointed municipal positions.

[16] In *EC-COI-01-1*, our analysis of the plain meaning of the phrase "such additional position" led us to the question of whether the phrase "such additional position" includes a municipal position "that exists by way of substitution for the prior municipal position." Thus, we found that while the plain language of the city councillor's exemption "at a minimum" prohibits "adding a third paid municipal employee position," it is "unclear whether it is also meant to prohibit substituting the city councillor's pre-existing municipal position for another position in which he has a financial interest in a contract, such as changing from school counselor to assistant principal or principal." In *EC-COI-01-1,* this perceived lack of clarity was resolved in the affirmative by reference to legislative history. In retrospect, our earlier analysis created unnecessary uncertainty by focusing excessively on the meaning of the words "such" and "additional" individually rather than construing them according to their ordinary meanings in the context in which they are used. As set forth in this decision, construed in context it is clear that the phrase "such additional position" includes a so-called "substituted" position. While our analysis of the city councillor's exemption in this decision finds more clarity in the statutory language and thus relies less on the statute's legislative history than that in *EC-COI-01-1*, the ultimate conclusions and application of the law set forth in the advisory opinion were sound.

[17] The city councillor's exemption was enacted in 1999 through an act (An Act Allowing Certain Muncipal Employees to Serve as City Councillors) amending the existing town councillor's exemption to § 20 which was, in turn, enacted in 1985 and modeled on the selectman's exemption as originally enacted in 1982. As we stated in *EC-COI-01-1*, "[b]ecause the relevant language in the selectman's exemption is identical to the language in the current city councillor's exemption and the language first appeared when the Legislature added the selectman's exemption to § 20, we may look to the legislative history of the selectman's exemption to determine the legislative intent of the phrase "such additional position."

[18] As described in *EC-COI-01-1,* the apparent legislative purpose of the city councillor's exemption was to both allow municipal employees to be elected as councillors while continuing their municipal employment and to bar councillors from gaining appointment to municipal positions through their elected office. Thus, a memorandum to the Governor and Lieutenant Governor from Director of Legislative Research of the Office of the Governor's Legal Counsel dated April 6, 1999 (the day before the Governor signed his approval of the Act) states, "Representative Knuttilla advises the Legislative Office that this bill is intended to address the specific circumstances of a City Councillor in Fitchburg who also holds the position of teacher in the City. … Because the City Councillor wants to announce for re-election to the City Council, and keep his teaching job and salary, this bill has been filed to provide city employees seeking to run for city council with the same exception currently enjoyed by municipal employees seeking to run for selectman or town councillor." As we had earlier observed in *EC-COI-82-107*, the appointment ineligibility provision was not part of the selectman's exemption as originally drafted but was added by amendment after the Legislature "was made aware of concerns over potential abuses in the dual status arrangement in particular where selectmen could potentially acquire other municipal positions by virtue of their incumbency in the office of selectman."

[19] To interpret the statute to forbid such reappointments would thwart the Legislature's intent to allow municipal employees to serve as elected city councillors. Such an interpretation would, for example, render the exemption illusory for school department employees and other municipal employees who are reappointed annually and would be forced to choose between their municipal employment and their elected office as soon as their annual reappointment came up after their election to the council.

[20] It is fully consistent with and indeed necessary to the purpose of the city councillor's exemption to apply the exemption's appointment prohibition to bar appointment to any new city position, particularly any new more highly paid city position. To do otherwise would leave open to municipal employees elected to the city council an "inside track" to appointment to different and better paid municipal positions, which the legislature evidently intended to foreclose with the exemption's appointment restriction.

[21] This conclusion is supported by the following statement of the sponsoring legislator (Rep. Cellucci) in his May 26, 1982 letter to Governor King explaining the operation and effect of the "selectman's exemption" legislation,

> Thus, for example, a teacher can be elected and serve as a selectman in the town he teaches [sic], but he cannot vote, on a matter which effects [sic] the school system, but a selectman who is not a teacher or other municipal employee cannot be appointed as a teacher or other municipal employee during his [selectman's] term or for six months thereafter.

[22] Under G. L. c. 268A, § 21, the Commission, "the district attorney for the district or the city or town or state may bring a civil action against any person who has acted to his economic advantage in violation of [§ 20], and may recover damages for the city or town in the amount of the economic advantage or five hundred dollars, whichever is greater. If there has been no final criminal judgment of conviction or acquittal of the same violation, the [commission], the district attorney or the city or town or state may in the discretion of the court recover additional damages for the city or town in an amount not exceeding twice the amount of the economic recovery or five hundred dollars, whichever is greater, and a judgment for such damages shall bar any criminal prosecution for the same violation." While we considered whether Uong should also return to the City the additional salary he received as a housemaster above what he would have received as a guidance counselor, we have decided to take no action on that issue at this time. The amount of the fine and the requirement that Uong give up the housemaster position reflect the seriousness of Uong's violations of G. L. c. 268A, § 20. In determining to make this Order, we have taken into account Uong's record of service to the Lowell Public Schools and the City as a whole.